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No. 85-2103

In the Supreme Court of the United States

OCTOBER TERM, 1986

UTILITY CONTRACTORS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases

Day v. *United States*, 245 U.S. 159 7

Koppers Co. v. *United States*, 405 F.2d 554 6

Maryland v. *Railroad Co.*, 89 U.S. (22 Wall.) 105 5

Moran v. *Prather*, 90 U.S. (23 Wall.) 492 5

Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 ..... 1, 8

Ordnance Research v. *United States*, 609 F.2d 462 6

Poorvu v. *United States*, 420 F.2d 993 6

Premier Elec. Constr. Co. v. *United States*, 473 F.2d 1372 6

Rapid Transit Corp. v. *New York*, 303 U.S. 573 5

Turnkey Enterprises, Inc. v. *United States*, 597 F.2d 750 7

United States v. *Spearin*, 248 U.S. 132 5

Williams v. *United States*, 289 U.S. 553 8

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Petitioner contends that the court of appeals erred in rejecting its claim that, under its construction contract with the United States, the government was liable for the cost of repairing damage caused by heavy rainstorms that occurred during the construction process. In addition, petitioner asserts that under *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Claims Court lacked jurisdiction to entertain its contract action against the United States.

1. On February 16, 1978, after competitive bidding, the United States awarded petitioner a flood control contract to widen and lower the Joe Creek channel in Tulsa, Oklahoma (Pet. App. 4). The contract included two provisions that "place[d] the risk of loss for all pre-completion damage to permanent work on [petitioner] with the exception of damage caused by flood or earthquake" (Pet. App. 8).

Paragraph 12, the Permits and Responsibilities Clause, provided (Pet. App. 17 n.3):

> The Contractor shall, without additional expense to the Government, be responsible for all materials delivered and work performed until completion and acceptance of the entire construction work, except for any completed unit of construction thereof which theretofore may have been accepted.

The Damage to Work Clause confirmed the contractor's responsibility for pre-completion damage not "caused by flood or earthquake."[1] The contract defined "flood" as follows (Technical Provisions, Paragraph 7.4):

> (1) For the reach of the project extending from the upstream limit of the work to station 114+44, any flow exceeding a stage of 651.8 feet mean sea level at the upstream side * * *
>
> (2) For the reach of the project extending from station 114+44 to the downstream limit of the work, any flow exceeding a stage of 630.5 feet mean sea level at the downstream side * * *.

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[1]This clause provided, in pertinent part (Pet. App. 18 n.4):

> The responsibility for damage to any part of the permanent work shall be as set forth in the clause of the contract entitled "Permits and Responsibilities." However, if, in the judgment of the contracting officer, any part of the permanent work performed by the contractor is damaged by flood or earthquake, which damage is not due to the failure of the contractor to take reasonable precautions or to exercise sound engineering and construction practices in the conduct of the work, the contractor will make the repairs as ordered by the contracting officer and full compensation for such repairs will be made at the applicable contract unit . . . [or lump sum prices as fixed and established in the contract]. Except as herein provided, damage to all work (including temporary construction), utilities, materials, equipment, and plant shall be repaired to the satisfaction of the contracting officer at the contractor's expense, regardless of the cause of such damage.

On June 8, June 20, and July 7, 1979, prior to completion of the project, heavy rainstorms caused damage to some of the concrete work (Pet. App. 7). It is undisputed that at no time did the storms cause the water to exceed the "flood" level as defined in the contract (Pet. App. 10). Nevertheless, after the June 8 rainstorm, and again after each of the next two rainstorms, petitioner filed with the United States a claim for reimbursement of the costs of repairing the concrete (Pet. App. 10). The government's contracting officer rejected these claims (Pet. App. 13).

2. On August 20, 1982, petitioner filed this action in the United States Court of Claims. Petitioner admitted that the water damage did not result from a "flood" as defined in the contract (Pet. App. 21). It alleged, however, that the United States had impliedly warranted that its contract specifications for the project would prevent pre-completion rainfall damage of the kind that occurred. Petitioner also contended that the contract should be reformed in order to relieve petitioner of its responsibility for the water damage because the United States had "constructive superior knowledge" of weather conditions and a duty to apprise petitioner of that particular risk.

On April 22, 1984, the Claims Court granted summary judgment for the United States, and in a memorandum decision issued on January 21, 1986, the court of appeals for the Federal Circuit affirmed on the basis of the Claims Court opinion. The Claims Court ruled, first, that the contract unambiguously made petitioner responsible for any damage that occurred prior to its completion of the project, unless that damage was caused by earthquake or flood (Pet. App. 16-19). There was no allegation of earthquake damage, and petitioner admitted that the rainstorms did not cause a "flood" within the meaning of the contract (Pet. App. 19-21). The court therefore held that petitioner was "responsible for all the damage to the work in accordance

with the * * * specifications [of the contract]" (Pet. App. 21).

The court next rejected petitioner's contention that the United States had prescribed "design specifications" (Pet. App. 36) giving rise to an implied warranty: "Plaintiff had a duty as set forth in great detail in the contract to exercise its own judgment and experience. The contract is more like a performance contract than a design contract, because plaintiff had '* * * the responsibility for the means and methods selected to achieve the end result' " (Pet. App. 38 (citation omitted)). Accordingly, the specifications "do not implicitly warrant pre-completion * * * [performance] or successful end product" (Pet. App. 39).

The court also rejected petitioner's claim that the United States had engaged in "inadvertent misrepresentation" (Pet. App. 50-52). The court found that "there was no showing of any misrepresentation on the part of the government intentionally or unintentionally" (Pet. App. 51). In any event, the court observed, petitioner understood "the ramifications of the flood-defining provision, [as] * * * shown by [petitioner's] adjustment in its bid price of approximately $60,000.00" (Pet. App. 51).[2]

3. The fact-bound decision below is correct and is consistent with the decisions of this Court and of other courts of appeals. Further review is unwarranted.

a. The contract made petitioner responsible for pre-completion damage not resulting from an earthquake or flood. The rainstorms concededly did not cause a "flood" as defined. The courts below applied the plain terms of the contract and correctly held that the government was not responsible for the rainstorm damage. As this Court has

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[2]The court also rejected several other legal claims not presented in the petition (Pet. App. 43-50).

held, "[t]here is no reason to limit the ordinary meaning of words used in a contract by men prepared to invest under its terms" (*Rapid Transit Corp.* v. *New York*, 303 U.S. 573, 592 (1938)). Accord, *Moran* v. *Prather*, 90 U.S. (23 Wall.) 492, 500-501 (1875); *Maryland* v. *Railroad Co.*, 89 U.S. (22 Wall.) 105, 111 (1874).

b. Petitioner contends, as it did below, that the United States impliedly warranted that the specifications furnished for the project would prevent pre-completion rainstorm damage. In support of that claim, petitioner cites this Court's decision in *United States* v. *Spearin*, 248 U.S. 132 (1918).

Petitioner misreads the *Spearin* case. There, the government contracted with the plaintiff for the construction of a dry-dock. The government furnished specifications that included detailed instructions for the reconstruction of a sewer. After plaintiff finished work on the sewer, but before it had completed the entire project, the sewer was destroyed by unexpected water pressure. Plaintiff sued the government, contending that the government was responsible for the resulting damage and this Court upheld plaintiff's claim. Ordinarily, the Court noted, "[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered" (248 U.S. at 136). From this general principle, however, an exception is made where "the contractor is bound to build according to plans and specifications prepared by the owner" (*ibid.*). In that event, "the contractor will not be responsible for the consequences of defects in the plans and specifications" (*ibid.*). In *Spearin*, the Court held, "the sewer * * * was to be built in accordance with the plans and specifications furnished by the Government" (*ibid.*). Thus, while "[t]he risk of the existing system proving adequate might have rested upon [the contractor], if the contract for

the dry-dock had not contained the provision for relocation of the * * * sewer[,] * * * the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate" (*id.* at 137).

But only where "the government issues design specifications of a detailed nature" is there any basis to conclude that it has "warrant[ed] the sufficiency and efficacy of those specifications to produce the desired product in a satisfactory manner" (*Ordnance Research* v. *United States*, 609 F.2d 462, 479 (Ct.Cl. 1979)). Where, on the other hand, the government "explain[s] to potential builders what type of facility it wants and allow[s] the [contractor] to design [and] construct" the building (*Poorvu* v. *United States*, 420 F.2d 993, 999 (Ct.Cl. 1970)), no such warranty will be implied. The courts of appeals uniformly agree. See, *e.g.*, *Premier Elec. Constr. Co.* v. *United States*, 473 F.2d 1372 (7th Cir. 1973) (Stevens, C.J.) (holding that the additional costs to a contractor caused by an early thaw were not the responsibility of the government); *Koppers Co.* v. *United States*, 405 F.2d 554, 566 (Ct.Cl. 1968)(where "[t]he intricacies of how to produce the product and under what conditions * * * were left to [the contractor]" no design warranty arises).

In this case, the courts below correctly applied these settled principles, ruling that no warranty could have arisen because the government did not issue detailed design specifications but rather afforded petitioner considerable discretion in devising the appropriate method for carrying out its obligations. For example, with respect to concrete mixing, the courts noted that "at almost every step, the contractor was to use its own judgment and experience in deciding how, when, where, under what conditions, and which proportion would be best for which project section" (Pet. App. 38). Petitioner "had a duty as set forth in great detail in the contract to exercise its own judgment and experience"

(*ibid.*). Indeed, as the courts noted, petitioner itself "admit-[ted] there were three or four available construction procedures, * * * all of which were standard and fully acceptable" (*id.* at 33-34). The essentially factual conclusion that the contract specifications did not give rise to any implied warranty does not warrant review by this Court.[3]

c. Petitioner apparently also contends (Pet. 50-51) that the United States had "constructive superior knowledge" of hydrology and weather and made an "innocent misrepresentation" with respect to the threat of heavy rains. The Claims Court correctly found, however, that "plaintiff ha[d] access to the same principles and knowledge available to the defendant" (Pet. App. 45) and that there was "no showing of any misrepresentation on the part of the government" (Pet. App. 51). These findings also do not warrant further review.[4]

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[3]The ordinary rule is that a contractor is responsible for costs arising from unforeseen obstacles. See *Day* v. *United States*, 245 U.S. 159 (1917). In *Day*, a contractor was engaged by the United States to reinforce a canal in order to prevent future flooding. The contract expressly made the contractor liable for any damage to the work that occurred prior to completion. Before the work was completed, a flood rose above a bulkhead built by the government specifically to protect the work during construction. The contractor sought to hold the government responsible for the added costs occasioned by the flood. This Court rejected the contractor's claim. Writing for a unanimous Court, Justice Holmes noted that "[o]ne who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking" (245 U.S. at 161). "[W]hen the scope of the undertaking is fixed, * * * the contractor takes the risk of the obstacles" (*ibid.*). Because the "Government * * * had not guaranteed that the bulkhead should be sufficient" (*ibid.*), the Court refused to relieve the contractor of his agreed-upon responsibility for damages incurred during the construction process.

[4]See, *e.g.*, *Turnkey Enterprises, Inc.* v. *United States*, 597 F.2d 750, 754 (Ct.Cl. 1979)("Generally, the government * * * does not assume an obligation to compensate a contractor for additional costs or losses it

4. Finally, petitioner contends that under this Court's decision in *Northern Pipeline* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the jurisdiction of the Claims Court over breach of contract claims against the United States is unconstitutional. This contention, not raised below, is frivolous. The plurality in *Northern Pipeline* expressly recognized that Congress has the power to create "legislative courts" under Art. I to decide cases involving so-called "public rights" (458 U.S. at 67), plainly including disputes arising under government construction contracts. Cf. *id.* at 69 n.21 (noting that in *Williams* v. *United States*, 289 U.S. 553 (1933), the Court had held that the Court of Claims was a legislative court).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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incurs resulting solely from weather conditions, which neither party expected or could anticipate and not from any act or fault of the government").